## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

and

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND USC UNIVERSITY HOSPITAL

and

Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328

21-CA-39403

NATIONAL UNION OF HEALTHCARE WORKERS

### RESPONDENT SODEXO AMERICA LLC'S MOTION FOR RECONSIDERATION AND FOR STAY OF DECISION

#### **MOTION**

Pursuant to Section 102.48(d)(1) and (2), 29 C.F.R. § 102.48(d)(1) and (2), of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Respondent Sodexo America, LLC ("Sodexo") moves for reconsideration of the Board's decision and order ("Decision") dated July 3, 2012, which is reported at 358 NLRB No. 79. This motion is timely as it is being filed within twenty-eight days of when the Decision was served. Section 102.48(d)(2).

Respondent USC University Hospital ("Hospital") also is filing a motion for reconsideration. Sodexo joins in that motion and incorporates it by reference. Sodexo's motion here raises those additional issues that pertain to Sodexo only for which Sodexo requests reconsideration. Sodexo raised many of these arguments at pages 8 through 10 of its answering brief, but the arguments were not addressed by the Board in the Decision. In any event, even in the absence of exceptions, the Board is free to reconsider the scope of its remedy. *Anheuser-Busch, Inc.*, 337 NLRB 756, 756 n.2 (2002).

Sodexo requests that the Board issue an order to show cause as to why these motions for reconsideration should not be granted. It is further requested that the Board stay its July 3, 2012 decision until it rules on these motions. *See Reliable Roofing Co., Inc.*, 250 NLRB 256, 256-57 (1980); Rule 102.48(d)(3), 29 CFR § 102.48(d)(3).

By submitting this request for reconsideration, Sodexo is not conceding that the Board is properly constituted as required by the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, \_\_\_\_ U.S. \_\_\_\_, 130 S.Ct. 2635 (2010), and the National Labor Relations Act ("NLRA"). In fact, Sodexo's maintains that the Board is not properly constituted as two of its current members (Members Block and Griffin) joined the Board by recess appointment and were not appointed as in the manner required by the United States Constitution.

#### INTRODUCTION

These cases involve the <u>Hospital's</u> off-duty access policy ("Policy"). In the Consolidated Complaint ("Complaint"), the Acting General Counsel alleged Sodexo violated NLRA § 8(a)(1), 29 U.S.C § 158(a)(1), by maintaining a 2008 version of the Policy. (GC Ex. 1(y)). The Complaint alleged in paragraph 11 that Sodexo maintained the 2008 version of the Policy by posting it on bulletin boards and by making oral announcements about it. Sodexo denied these allegations in its answer. (GC Ex. 1(y) at

¶ 11; GC Ex. 1(ax); (GC Ex. 2). Sodexo and the Acting General Counsel further stipulated that the Policy was the Hospital's Policy. (GC Ex. 2, ¶ 6).

There is no allegation that Sodexo violated NLRA § 8(a)(3), 29 U.S.C § 158(a)(3). There is no allegation that Sodexo promulgated or enforced the Policy. There is no allegation that Sodexo disciplined any employee under the Policy. Those allegations are directed to the Hospital only. (See Complaint at ¶¶ 12, 13, and 14; GC Ex. 3; T. 20). Indeed, in his exceptions, the Acting General Counsel only excepted to the administrative law judges's ("ALJ") failure to find that Sodexo maintained and announced the Policy; he only sought an order prohibiting Sodexo from "announcing or displaying an invalid policy...." Acting General Counsel's Exceptions at 2; Acting General Counsel's Brief in Support of Exceptions at 19. Any other exception is waived. Rule 102.46(b)(2), 29 C.F.R. § 102.46(b)(2).

The Acting General Counsel did not seek an order prohibiting Sodexo from promulgating or enforcing the Policy for the obvious reasons that (1) no such allegations were alleged against Sodexo and (2) there is no record evidence that would support such a finding. In its Decision, slip op. at 1, the Board only found that Sodexo had posted the Policy. Presumably, the violation of Section 8(a)(1) by Sodexo is based on the finding that Sodexo posted the Policy. The Board made no factual finding that Sodexo maintained the Policy in any other way, or that Sodexo either promulgated or enforced the Policy.

The Policy prohibited off-duty employees from entering or reentering the interior of the Hospital or any other work area outside the hospital, "except to visit a patient,

The administrative law judge ("ALJ") made the same finding to which Sodexo took an exception. *Decision*, slip. op. at 5. Sodexo's exception is not addressed in the Board's decision. *See* Sodexo's Cross-Exceptions at 2 (Exception No. 1). Sodexo still maintains that there is no evidentiary support for the finding that it posted the Policy or that such posting violated Section 8(a)(1).

receive medical treatment or to conduct hospital-related business." The majority found that the Hospital could lawfully prohibit off-duty employees from entering or reentering the interior of the Hospital, except to visit a patient or receive medical treatment. *Id.*, slip op. at 3. The majority found the Policy's "exceptions for off-duty employees who are either visiting patients or seeking medical care" did not run afoul of the requirement in *Tri-County Med. Center*, 222 NLRB 1089 (1976) ("*Tri-County*"), that the Policy prohibit off-duty employees' access to the interior working areas of the facility for all purposes, and not just for union activity. The majority only found the Policy was overbroad because off-duty access was allowed "to conduct hospital-related business." In footnote 2 of his dissenting opinion, slip op. at 4, Member Hayes disagreed with the majority on this point.

Following its earlier decision in *Continental Group*, 357 NLRB No. 39 (2011), the majority further held that disciplining an employee pursuant to an overbroad policy is not itself unlawful. *Decision*, slip op. at 2-3. The employee's conduct underlying the discipline must implicate rights guaranteed by NLRA § 7, 29 U.S.C. § 157. For that reason, a remand to the administrative law judge was ordered to determine whether the <u>Hospital's</u> discipline of four <u>Hospital</u> employees implicated concerns underlying Section 7. Thus, the Board has yet to find any unlawful enforcement of the Policy by anyone.

#### SUMMARY OF ARGUMENT

In addition to the reasons the Hospital asserts, Sodexo requests reconsideration for the following reasons:

• The Complaint only alleges that Sodexo violated Section 8(a)(1) by "maintaining" a 2008 version of the Policy. The Order and the Notice to Employees ("Notice") are overbroad as they order Sodexo to cease "promulgating" or "enforcing" the Policy. At most, any remedy should be limited to ordering

Sodexo to cease and desist from maintaining the Policy by posting the Policy.

- The Order and the Notice prohibit an off-duty access policy that permits off-duty employee access to the Hospital facility for some purposes while barring off-duty access for other purposes. The Order and Notice are overbroad as the Decision found the Policy could, consistent with *Tri-County*, permit off-duty employees access to visit a patient, to obtain medical treatment, or for any other reason where the off-duty employee is acting as a member of the general public. The Notice and the Order conflict with the Decision's findings.
- The Decision and the Order are overbroad because they prohibit enforcement of the Policy for any reason even though there is no evidence of unlawful enforcement by Sodexo and even though enforcement is unlawful only when the discipline implicates conduct protected by Section 7.
- The Notice is overbroad when it states that Sodexo will "not do anything" to interfere with Section 7 rights.
- The Notice is overbroad where it purports to impose remedial obligations beyond the Hospital facility.

#### <u>ARGUMENT</u>

Reconsideration by the Board is appropriate where the Board acts sua sponte and imposes relief not requested by the Acting General Counsel or by any other party. Indeed, a request for reconsideration is required in order to obtain federal appellate review. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666 (1982); NLRB v. Sambo's Rest., Inc., 641 F.2d 794, 796 (9th Cir. 1981). Further, reconsideration is appropriate where the Board committed "the type of error that, if corrected, would eliminate an essential factual foundation supporting a violation." KSM Indust., Inc., 337 NLRB 987, 989 (2002) (Cowen, dissenting). Reconsideration is also appropriate to correct the remedial notice so it conforms precisely to the Board's order. Anheuser-Busch, 337 NLRB at 756. As shown below, the Decision makes several material errors.

The Board does not have the authority to restrain generally unlawful practices which are neither found to have been pursued nor to be related to the proven unlawful conduct. *Communications Workers v. NLRB*, 362 U.S. 479 (1960); *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). Here, the Order and the Notice go well beyond the Complaint's allegations as to Sodexo.

The Decision orders Sodexo to cease and desist from "[p]romulgating, maintaining, and enforcing a rule which limits off-duty employee access to the Hospital's facility for some purposes while permitting access for other purposes." The Decision further orders that Sodexo to "[r]escind the off-duty access policy to the extent that it permits off-duty employee access to the facility for some purposes while barring off-duty access for other purposes." Nearly identical language is included in the Notice. *Decision*, slip op. at 3.

As to Sodexo, the Order and the Notice are overbroad. The Decision found that the Policy was lawful where it permitted off-duty employees access to visit a patient, to obtain medical treatment, or for any other reason where the off-duty employee was acting as a member of the general public. Promulgating, maintaining, and enforcing such a policy does not violate the NLRA and cannot be proscribed. *Anheuser-Busch*, 337 NLRB at 756; *Centano Super Markets*, 220 NLRB 1151, 1151 n. 5 (1975), *enf'd per curiam*, 555 F.2d 442 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

Even if the Policy is overbroad, and Sodexo maintains it is not, enforcement of the Policy does not violate the NLRA unless employees are involved in activities implicating concerns underlying Section 7 rights. The Order and the Notice here proscribe enforcement of an off-duty access policy under all circumstances. On its face, the Order and the Notice proscribe discipline that is beyond the NLRA's reach.<sup>2</sup>

As to Sodexo, there is no allegation or evidence that Sodexo promulgated or enforced the Policy. Therefore, even if the Order and the Notice, as outlined above, are proper as to the Hospital, they are not proper as to Sodexo. *Keystone Steel & Wire v. NLRB*, 606 F.2d 171, 180 (7th Cir. 1979) (refused to enforce Board order that went beyond the precise unlawful conduct at issue). As Sodexo was only found to have posted the Policy, at most any order and notice should be limited to not posting the Policy.

The Notice is improper for two additional reasons. The Notice must be modified, assuming any violation is found.

First, after summarizing the rights guaranteed by Section 7, the Notice states the following: "We will not do anything that interferes with these rights." *Decision*, slip op. at 3. This language is inconsistent with the Order's narrower prohibition of only "like or related" conduct. The Notice in this regard smacks of a broad order, which can only be imposed when there is a finding that the employer has a proclivity to violate the NLRA. *Express Publishing*, 312 U.S. at 430-39; *Metro Managers, Inc.*, 357 NLRB No. 150, slip op. at 2 n.2 (April 29, 2011). There is no finding that Sodexo has a proclivity to violate the NLRA, and the Acting General Counsel made no such claim. This language did not appear in the notices in either *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 8, *enforcing with modifications*, 353 NLRB No. 31, slip op. at 6 (Sept. 30, 2008), in *Tri-County*, 222 NLRB at 1091, or in a host of other cases. Indeed, there is no explanation as to why this language appears in the Notice here. This language should be stricken from the Notice.

Further, it is yet to be determined as to whether the Hospital unlawfully enforced the Policy. Therefore, the Order's and the Notice's prohibition against enforcement of the Policy is premature.

Second, the Notice also provides that Sodexo will not promulgate, maintain, or

implement a rule which limits off-duty access to "our facilities ...." Decision, slip op.

at 3. The Notice thus suggests that the remedy is not limited to the Hospital facility. The

Policy, however, applied only to the Hospital facility and the Order is similarly limited to

the "Hospital's facility ...." Id. As there is no evidence that Sodexo is likely to violate

the NLRA at any other location, any remedy must be limited to the Hospital's facility.

The Notice as drafted is overbroad. C. E. Wylie Constr. Co., 310 NLRB 721, 722-23

(1993).

**CONCLUSION** 

Based upon the foregoing, it is requested that the motion for reconsideration be

granted. The ALJ's decision should be affirmed, and the Complaint should be dismissed.

Alternatively, instead of lumping Sodexo and the Hospital together, there should be

separate orders and notices that address only those allegations that are alleged and proven

as to each respondent. It is further requested that the Board stay its July 3, 2012 decision

until it rules on these motions.

DATED: July 27, 2011

Respectfully submitted,

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## PROOF OF SERVICE VIA ELECTRONIC MAIL AND/OR OVERNIGHT EXPRESS

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I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California; where the mailing occurs; and my business address is 4747 Executive Drive, Suite 700, San Diego, California 92121-3107. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice the correspondence will be deposited with the United States Postal Service this

same day in the ordinary course of business. I caused to be served the following document(s): RESPONDENT SODEXO AMERICA LLC'S MOTION FOR RECONSIDERATION AND FOR STAY OF DECISION, by placing either a copy thereof in a separate overnight envelope or by electronic mail for each addressee listed as follows:

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Executed on July 27, 2012.

BRANDI D. PAAPE

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